

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>LARRY PINNELL</b>	)	
Claimant	)	
V.	)	
	)	
<b>TSI KANSAS, INC.</b>	)	
Respondent	)	Docket No. 1,058,650
AND	)	
	)	
<b>AMERICAN INTERSTATE INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

**STATEMENT OF THE CASE**

Claimant appealed the April 4, 2016, Order on Motion to Dismiss entered by Administrative Law Judge (ALJ) Rebecca Sanders. Scott M. Price of Salina, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 30, 2016, motion to dismiss hearing; and all pleadings contained in the administrative file.

**ISSUE**

The ALJ dismissed this claim for a September 23, 2011, work injury because claimant did not proceed to a regular hearing, settlement hearing or an agreed award within three years of filing an application for hearing and did not file a motion for an extension of time within the three-year period, as based on K.S.A. 2011 Supp. 44-523(f)(1).

Claimant's counsel acknowledged he did not file a motion to extend the three-year period, but argues the claim should not be dismissed because respondent paid temporary total disability (TTD) benefits and medical bills for more than a year after the three-year period expired, claimant was still receiving medical care for his work injuries and he was not at maximum medical improvement. Claimant also asserts he continually prosecuted the claim and respondent produced no evidence there was a lack of prosecution.

Claimant asserts K.S.A. 44-534(b) permits him to file an application for hearing within three years after the date of accident or within two years after medical benefits were last paid, whichever is later. Claimant asserts respondent last paid medical benefits on January 15, 2016. Therefore, claimant could have waited until January 15, 2018, to file his application for hearing and should not be penalized for filing his application for hearing at an earlier date.

Claimant argues, that at the very least, this matter should be remanded because he was not afforded a full hearing, as required by K.S.A. 2011 Supp. 44-523(f)(1). Claimant contends the ALJ did not take stipulations, set terminal dates or conduct a full hearing.

Respondent maintains the Order should be affirmed. Respondent argues claimant failed to file the required motion for extension of time within the three-year period, and his case was rightfully dismissed.

The issue is: was dismissal pursuant to K.S.A. 2011 Supp. 44-523(f) appropriate?

#### **FINDINGS OF FACT**

Claimant sustained injury by accident on September 23, 2011. Claimant filed his application for hearing on November 30, 2011, alleging right lower extremity and back injuries.

Claimant filed several applications for preliminary hearing from October 22, 2012, through July 29, 2013, requesting medical treatment, a motorized scooter and lift chair repair or replacement. However, no preliminary hearings were held. Nor were a regular hearing or a prehearing settlement conference held.

On January 19, 2016, respondent filed an application for dismissal, which alleged more than three years had passed since claimant filed his application for hearing and the matter had not proceeded to a regular hearing, settlement hearing or agreed award. Respondent also alleged claimant filed no motion to extend the three-year period.

Claimant, on March 29, 2016, filed a response to respondent's application for dismissal. Claimant asserts TTD was paid until January 24, 2016, claimant received medical care until January 15, 2016, he was not at maximum medical improvement and respondent paid for his medical expenses through January 15, 2016. Claimant alleges there was no lack of prosecution of his claim.

On March 30, 2016, the hearing on respondent's application was held. In the April 4, 2016, Order on Motion to Dismiss, the ALJ dismissed the claim because, "K.S.A. (2011 Supp.) 44-523(f)(1) is explicit, even if good cause exists, that the motion to extend

must be filed prior to the three year limitation for the extension to be granted. That has not been done in this case.”<sup>1</sup>

### PRINCIPLES OF LAW AND ANALYSIS

Kansas workers compensation appellate cases emphasize literally interpreting and applying plainly worded workers compensation statutes.<sup>2</sup> The text of a statute should not be supplanted by information outside the plain wording of a statute.<sup>3</sup> *Hoesli*<sup>4</sup> states:

When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007). We determine legislative intent by first applying the meaning of the statute's text to the specific situation in controversy. See *State v. Phillips*, 299 Kan. 479, 495, 325 P.3d 1095 (2014) (first task in construing statute is to ascertain legislative intent through analysis of language employed, giving ordinary words their ordinary meanings). A court does not read into the statute words not readily found there. *Whaley*, 301 Kan. at 196, 343 P.3d 63; *Graham*, 284 Kan. at 554, 161 P.3d 695; see *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 525, 154 P.3d 494 (2007). When the language is unclear or ambiguous, the court employs the canons of statutory construction, consults legislative history, or considers other background information to ascertain the statute's meaning. *Whaley*, 301 Kan. at 196, 343 P.3d 63.

K.S.A. 2011 Supp. 44-523(f)(1) states:

In any claim that has not proceeded to a regular hearing, a settlement hearing, or an agreed award under the workers compensation act within three years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such

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<sup>1</sup> ALJ Order at 2.

<sup>2</sup> *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009); see also *Fernandez v. McDonald's*, 296 Kan. 472, 478, 292 P.3d 311 (2013); *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 618, 256 P.3d 828 (2011); *Hall v. Knoll Bldg. Maint., Inc.*, 48 Kan. App. 2d 145, 152, 285 P.3d 383 (2012); *Messner v. Cont'l Plastic Containers*, 48 Kan. App. 2d 731, 741-42, 298 P.3d 371 (2013), *rev. denied* (Aug. 30, 2013); and *Tyler v. Goodyear Tire and Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

<sup>3</sup> See *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 560-61, 293 P.3d 723 (2013).

<sup>4</sup> *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 361 P.3d 504, 508-09 (2015).

motion to extend is filed prior to the three year limitation provided for herein. If the claimant cannot establish good cause, the claim shall be dismissed with prejudice by the administrative law judge for lack of prosecution. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

K.S.A. 44-534(b) states:

No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

In *Hackler*,<sup>5</sup> *Hoffman*,<sup>6</sup> *Ramstad*<sup>7</sup> and *Glaze*,<sup>8</sup> the Board stated a claimant's motion to extend the three-year period upon a showing of good cause must be made before the three-year period expires. Because such motions were either not timely filed or not filed at all, the Board affirmed dismissals of those claims. In *Riedmiller*,<sup>9</sup> the Board reversed a dismissal under K.S.A. 2011 Supp. 44-523(f) where the claimant: (1) requested an extension of time before the three-year period expired and (2) she was prosecuting her claim.

This claim is akin to *Hackler*, *Hoffman*, *Ramstad* and *Glaze*. Under the literal text of K.S.A. 2011 Supp. 44-523(f), a motion to extend must be filed within the three years after an application for hearing is filed and claimant must prove good cause to warrant an extension. The first sentence of the statute equates a lack of prosecution with a claimant taking more than three years after the filing of an application for hearing to get to a regular hearing, settlement hearing or award.

Claimant's argument that he could have waited to file his application for hearing as late as January 15, 2018, is a red herring. K.S.A. 2011 Supp. 44-523(f)(1), in part, states, "In any claim that has not proceeded to a regular hearing, a settlement hearing, or an agreed award under the workers compensation act within three years from the date of

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<sup>5</sup> *Hackler v. Peninsula Gaming Partners, LLC*, No. 1,060,759, 2016 WL 858312 (Kan. WCAB Feb. 25, 2016).

<sup>6</sup> *Hoffman v. Dental Central, P.A.*, No. 1,058,645, 2015 WL 4071473 (Kan. WCAB June 26, 2015).

<sup>7</sup> *Ramstad v. U.S.D. 229*, No. 1,059,881, 2015 WL 5462026 (Kan. WCAB Aug. 31, 2015).

<sup>8</sup> *Glaze v. JK Williams LLC*, No. 1,063,419, 2016 WL 2619518 (Kan. WCAB Apr. 11, 2016), *pet. for rev. filed* May 6, 2016.

<sup>9</sup> *Riedmiller v. Del Monte Foods Co.*, No. 1,061,483, 2015 WL 9672643 (Kan. WCAB Dec. 14, 2015).

**filing** an application for hearing . . . . (Emphasis added.)” Claimant chose to file his application for hearing on November 30, 2011. The plain and unambiguous meaning of K.S.A. 2011 Supp. 44-523(f)(1) is that the three-year period commences from the date the injured worker files his or her application for hearing, not from the last date the application for hearing could have been filed pursuant to K.S.A. 44-534(b).

The Board rejects claimant’s argument that he was not accorded a full hearing. At the March 30, 2016 motion hearing, claimant’s counsel was afforded an opportunity to present arguments on behalf of claimant. No objection was made to how the hearing was being conducted. Claimant’s counsel made no request to present testimony or evidence nor requested a period of time to present written argument and authority to the ALJ.

For reasons set forth in *Hackler*, the Board respectfully disagrees with the dissent.

#### **CONCLUSION**

Having carefully reviewed the entire evidentiary file contained herein, the Board affirms the ALJ’s dismissal under K.S.A. 2011 Supp. 44-523(f).

#### **ORDER**

**WHEREFORE**, the Board affirms the April 4, 2016, Order on Motion to Dismiss.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 2016.

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BOARD MEMBER

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DISSENT

The undersigned Board Member respectfully dissents for the reasons set forth in *Hackler*. For a dismissal to be based on a lack of prosecution, there must be a lack of prosecution and the statute, as a condition of dismissal, requires a specific finding claimant failed to establish good cause. Claimant has prosecuted his case without a lack of prosecution and the ALJ made no finding that claimant lacked good cause for an extension. Therefore, dismissal was improper.

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BOARD MEMBER

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